Supreme Court of Ohio Clerk of Court - Filed October 05, 2015 - Case No. 2015-0384

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

v.

RAFAEL GONZALES

Defendant-Appellee

CASE NO. 2015-0384; 2015-0385

ON APPEAL FROM WOOD COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO. WD-13-086

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEY'S ASSOCIATION AND CUYAHOGA COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the appellant, the State of Ohio, in its merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE OHIO PROSECUTING ATTORNEY ASSOCIATION AND THE CUYAHOGA COUNTY PROSECUTOR'S OFFICE

The Ohio Prosecuting Attorneys Association ("OPAA") and the Cuyahoga County Prosecutor's Office offers this amicus brief in support of the State of Ohio's and urges this Court to reverse the decision of the Sixth District Court of Appeals in *State v. Rafael Gonzales,* 6th Dist. Wood No. WD-13-086, 2015-Ohio-461.

The OPAA is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: "To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing educations of its members." The OPAA is concerned about the construction of R.C. 2925.11 advanced by the decision in *Gonzales,* 6th Dist. Wood No. WD-13-086, 2015-Ohio-461. This decision also implicates the construction of R.C. 2925.03. The thirty-four judges of the Cuyahoga County Court of Common Pleas presides over an extremely large number of criminal cases each year which are brought by the Cuyahoga County Prosecutor's

Office. The General Felony Unit and the Major Drug Offender Unit of the Cuyahoga County Prosecutor's Office prosecutes a myriad of drug cases ranging from lower level possession cases to cases involving major drug traffickers. The Cuyahoga County Prosecutor's Office case management database shows 4,511 total matters or cases with indictments published after 1-1-2012.

A breakdown of these cases are as follows:

Charge Level	**Matters**
F1	192
F2	76
F3	197
F4	290
F5	3754
M1	2
Grand Total	**4511**

The numbers above only reflect the highest-level cocaine charge in each case where there was at least one cocaine charge.

The decision in *State v. Rafael Gonzales,* 6th Dist. Wood No. WD-13-086, 2015-Ohio-461 requires the labs throughout the State of Ohio to test cocaine using quantitative methods, a process which has not been regularly conducted in state level prosecutions. The ruling in *Gonzales* would represent a drastic shift in testing methodology, from qualitative testing to quantitative testing.

This shift would affect every local government crime lab in the State of Ohio. Outside of the Bureau of Criminal Investigation labs and the Ohio State Highway Patrol labs, there are several labs in the State of Ohio that are accredited by the American Society of Crime Laboratory/Laboratory Accreditation Board in Drug Chemistry. These include the Canton-Stark County Crime Laboratory, the Columbus Police Crime Laboratory, Cuyahoga County Regional Forensic Science Laboratory, Lake County Crime Laboratory, Mansfield Division of Police Forensic Science Laboratory and the Miami Valley Regional Crime Laboratory. See ASCLD/LAB Accredited Laboratory Index, available at http://www.ascld-lab.org/accredited-laboratory-index/). Police departments in Cuyahoga County utilize both the Cuyahoga County Regional Forensic Science Lab and the Ohio BCI lab.

The Cuyahoga County Regional Forensic Science Lab tested 5,896 submissions containing a measurable amount of cocaine and excluding samples with residues. By year the number includes 983 submissions in 2010, 1,523 submissions in 2011, 1,245 submissions in 2012, 1098 submissions in 2013 and 1,047 submissions in 2014. For the Miami Valley Crime Lab had just over 6,000 occurrences of cocaine testing from January 1, 2011 to present and involved all thresholds. The Lake County Crime Laboratory tested 1,532 items that were identified as cocaine from 2011 and 2014. Aside from the sheer number of cases past, present, and future that could be affected by the decision in this case, this decision would have other impacts.

Accredited labs in Ohio will face the same issues as the Ohio BCI labs. For these laboratories currently conducting qualitative tests in drug chemistry, any shift in legal requirement will affect their immediate workload, create staffing issues, and would create a back log. Aside

from staffing issues these labs will require additional approved policies and procedures to conduct quantitative analysis of a drug and maintain accreditation. Although a laboratory maybe accredited by the ASCLD/LAB in the discipline of Drug Chemistry, that accreditation does not include a certification to conduct quantification or purity analysis. An established written procedure for quantification would be necessary to conduct a quantitative analysis of drugs. These issues will ultimately affect the timely prosecution of cases in Ohio and in the interim could render prosecutors unable to obtain any conviction for possession of cocaine above the felony five level if quantitative analysis was required. The table below lists the Ohio lab and corresponding scope of accreditation and references for comparison purposes the United States Department of Justice DEA Labs:

NAME OF LAB	SCOPE OF TESTING	Scope of Accredidation
United States Department of Justice, DEA, various labs	Categories of Testing Includes Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-001-T.pdf http://www.ascld-lab.org/cert/ALI-002-T.pdf http://www.ascld-lab.org/cert/ALI-003-T.pdf http://www.ascld-lab.org/cert/ALI-005-T.pdf http://www.ascld-lab.org/cert/ALI-006-T.pdf http://www.ascld-lab.org/cert/ALI-007-T.pdf http://www.ascld-lab.org/cert/ALI-008-T.pdf

		http://www.ascld-lab.org/cert/ALI-009-T.pdf
Canton-Stark County Crime Lab	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-373-T.pdf
Columbus Police Department Crime Lab	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-011-T.pdf
Cuyahoga County Regional Forensic Science Lab	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-181-T.pdf
Lake County Crime Lab	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-090-T.pdf
Mansfield Division of Police	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-382-T.pdf
Miami Valley Regional Crime Lab	Does Not Include Quantitative Analysis	http://www.ascld-lab.org/cert/ALI-280-T.pdf

Source: ASCLD/LAB: Accredited Laboratory Index, available at: http://www.ascld-lab.org/accredited-laboratory-index/, last accessed October 2, 2015

LAW AND ARGUMENT

PROPOSITION OF LAW: IN A PROSECUTION UNDER R.C. 2925.11(A) AND (C)(4), THE PROSECUTION DOES NOT NEED TO PROVE THAT THE DRUG INVOLVED WAS PURE COCAINE; INSTEAD, THE PROSECUTION NEED ONLY PROVE HAT THE DRUG INVOLVED WAS "COCAINE OR COMPOUND, MIXTURE, PREPARATION, OR SUBSTANCE CONTAINING COCAINE." THE OFFENSE, LEVEL FURTHERMORE, IS DETERMINED BY THE TOTAL WEIGHT OF THE DRUG INVOLVED (THE COMPOUND, MIXTURE, PREPARATION, OR SUSBSTANCE CONTAINING COCAINE), NOT JUST THE WEIGHT OF ACTUAL COCAINE CONTAINED THEREIN.

CERTIFIED CONFLICT QUESTION: MUST THE STATE, IN PROSECUTING OFFENSES INVOLVING MIXED SUBSTANCES UNDER R.C. 2925.11(C)(4)(a) THROUGH (f), PROVE THAT THE WEIGHT OF THE COCAINE MEETS THE STATUTORY THRESHOLD, EXCLUDING THE WEIGHT OF ANY FILLER MATERIALS USED IN THE MIXTURE?

Although a statute is to be applied as written where the statute is unambiguous, where the words of the statute are ambiguous, meaning that it is subject to more than one reasonable interpretation, the court is charged with construing the language in a manner that reflects the intent of the General Assembly. *Bernardini v. Conneaut Area City School Dist. Bd. Of Edn.*, 58 Ohio St. 2d 1, 4, 12 Ohio op. 3d 1, 3, 387 N.E.2d 1222, 1224, *Cochrel v. Robinson,* 113 Ohio St. 526, 149 N.E. 871 (1925), paragraph four of the syllabus and *State v. Jordan,* 89 Ohio St. 3d 488, 492, 733 N.E.2d 601, 605.

There is no obvious intent from the General Assembly that the punishment for cocaine be based solely on the weight of the actual cocaine. Every other drug contemplates the weight of the drug involving a "compound, mixture, preparation or substance" that contains the drug. Under

R.C. 1.49, where a statute is ambiguous, courts may consider the following to determine legislative intent: the object sought to be obtained, the circumstances under which the statute was enacted, the legislative history and the consequences of a particular construction.

The legislative history and circumstances in which R.C. 2925.11(C)(4) and the prior history of R.C. 2925.11(C)(4) illuminates the legislative intent, and strongly indicates that the words used in R.C. 2925.11(C)(4) were not used with the objective to uniquely require purity testing when it comes to cocaine, as opposed to other controlled substances. The statute at issue formerly read, "If the amount of the drug equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine," and now reads, "If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine…"

It has long been recognized that the content or purity of cocaine is immaterial so long as there is *any amount* of cocaine in the compound or substance. See *State v. Remy*, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630, ¶50 citing *State v. Brown*, 107 Ohio App.3d 194, 202, 668 N.E.2d 514 (3rd Dist. 1995) quoting *State v. Neal*, Hancock App. No. 5-89-6, 1990 Ohio App. Lexis 2937 (June 29, 1990).

Prior to the Sixth District's decision in *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, courts throughout Ohio have not interpreted the provisions of R.C. 2925.11(A) and (C)(4) as requiring the State to prove in a prosecution the actual weight of the cocaine involved. R.C. 2925.11(A) punishes the possession of a controlled substance and the punishment varies based on the drug involved and weight of the controlled substance. A controlled substance is

statutorily defined as a drug, compound, mixture, preparation, or substance included in the Schedule I, II, III, IV, or V drug schedules. R.C. 3719.01 and R.C. 2925.01(A). Many drugs described in the Chapter 2925 are described in terms of a "compound, mixture, preparation or substance that is or contains any amount of the drug." See for example R.C. 2925.01(D), R.C. 2925.11(C)(3),(5). The Sixth District's holding in *Gonzales* centers upon its interpretation of the cocaine definitions. The court reasoned that because the punishments for possession of cocaine use language such as "equals or exceeds […] grams of cocaine…" as opposed to "equals or exceeds […] grams…" and because the cocaine definition does not include "any quantity of" cocaine that there is an intentional legislative intent that the prosecution must prove the actual weight of the cocaine, absent any fillers, to meet the various statutory thresholds. *Gonzales*, ¶42-45.

But it is far from obvious that this was an intentional step from the General Assembly to require purity or quantitative testing. The inartful language was a result of 2011 Am. Sub. H.B. 86 amendments to the criminal code (H.B. 86). Prior to H.B. 86, and under S.B. 2 Ohio's drug laws distinguished crack cocaine from other forms of cocaine. The primary goal in amending the cocaine definition, under H.B. 86, was to eliminate the crack cocaine distinction and not an effort to require the prosecution to prove the weight of actual cocaine in any substance containing cocaine. See also Final Analysis of Am. Sub. H.B. 86, Ohio Legislative Service Commission, Final Analysis, pg. 65 (available at http://www.lsc.ohio.gov/analyses129/11-hb86-129.pdf, last accessed 10/2/2015).

The current and former definition of cocaine was defined under R.C. 2925.01(X) as:

> (1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;
>
> (2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;
>
> (3) A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

In addition, the Revised Code formerly defined "crack cocaine" as a "compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use." Former R.C. 2950.01(GG). The definition of crack cocaine was eliminated with H.B. 86 when the distinction between crack cocaine and cocaine were eliminated.

Each felony level of possession of cocaine had different thresholds based on whether the drug involved was cocaine or crack cocaine. The former and current threshold levels for possession of cocaine (assuming no schoolyard specification), were as follows:

FELONY LEVEL	R.C. 2925.11, PRE H.B. 86	R.C. 2925.11, AFTER H.B. 86
F-1	If the amount of the drug involved equals or exceeds five hundred grams but less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but less than one hundred grams of crack cocaine	If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine
F-2	If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or exceeds ten grams but less than twenty-five grams of crack cocaine	If the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine
F-3	If the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equal or exceeds five grams but is less ten grams of crack cocaine	If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine
F-4	If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine that is not crack cocaine or exceeds one gram or is less than five grams of crack cocaine	If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine

Rather than focus on the mere definition of "cocaine", the court should have taken into account the legislative history of R.C. 2925.11 and the reason why the word "cocaine" appeared under the subdivisions of R.C. 2925.11(C)(4) in reference to the threshold weights. The former language of the drug laws containing "cocaine that is not crack cocaine" and "crack cocaine" was meant to

differentiate within the various sub-divisions of the statute between the two types of cocaine. Specifically the statutes contained a structure that indicated, "If the amount of the drug involved equals or exceeds…grams but is less than…grams of cocaine that is not crack cocaine…or equals or exceeds…grams of crack cocaine…" This is likely why the former penalties did not simply state, "If the amount of the drug involved equals or exceeds… grams." In the context of the statute's history, the reference to "cocaine that is not crack cocaine" and "crack cocaine" distinguished between the two forms of cocaine without any specific requirement that the purity of the cocaine or crack cocaine be determined.

Even with these distinctions between the punishment for cocaine and crack cocaine, the statute made clear that "if the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine…" See former R.C. 2925.11(C)(4). Prior courts have held that based on the definition of crack cocaine under the former scheme, the prosecution was not required to prove the weight of crack cocaine. *State v. Troutman*, 9th Dist. Lorain No. 12CA010223, 2013-Ohio-4559.

When eliminating the distinctions between crack cocaine and cocaine, the General Assembly did not eliminate the referential word "cocaine". This should not be construed as unambiguous evidence that the General Assembly intended the State to prove the pure weight of cocaine. The crime of possession of cocaine only requires the person possess any compound, mixture, preparation, or substance containing cocaine. R.C. 2925.11(C)(4). This construction is consistent with the remaining provisions of R.C. 2925.11. No other drug is couched in terms that

would lead one to believe that testing of the purity or actual weight of the drug is necessary as all refer to compounds or substances containing any amount of the drug. The weight of other drugs in the drug possession refer back to the "compound, mixture, preparation or substance containing" the drug. Cocaine is no different, the "amount of the drug" referenced in R.C. 2925.11(C)(4) and the corresponding weight of "cocaine" is meant to refer back to the "compound, mixture, preparation or substance containing cocaine," and not the pure amounts of cocaine.

The Court in *Gonzales* interpreted the inclusion of "cocaine" as intentional. It is not. A stronger indication that the General Assembly intended to shift punishment of possessing cocaine based on the purity level would have been if they specifically crafted the statute to unambiguously require a purity level of cocaine. This language does not appear in R.C. 2925.11.

It appears more likely that the use of the word "cocaine" after the referenced weight in R.C. 2925.11(C)(4) was an oversight by the General Assembly, when the General Assembly eliminated the distinctions of cocaine weight and crack cocaine weight. This would not be the first legislative drafting error contained within a bill. For example when reviving consecutive sentence finding under H.B. 86, the General Assembly failed to amend R.C. 2929.41 to reflect the revisions to R.C. 2929.14. This lead to creative arguments that the General Assembly eliminated the ability four courts to impose consecutive sentences all together. This was easily rejected by the appellate courts. See *State v. Ryan,* 8th Dist. Cuyahoga No. 98005, 2012-Ohio-5070. See also *State v. White,* 5th Dist. Perry No. 12-CA-00018, 2013-Ohio-2058, *State v. Hess,* 2nd Dist. No. 25144, 2013-Ohio-10. As these courts recognized,

> "when it appears beyond a doubt that a statute, when read literally as printed, is impossible of execution, or *will defeat the plain object of its enactment,* or is

> senseless, or leads to absurd results or consequences, a court is authorized to regard such defects as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake by permitting the clear purpose and manifest intention of the Legislature to be carried out."

Ryan, ¶20 citing *State v. Gomez*, 9th Dist. Nos. 25496 and 25501, 2011-Ohio-5475.

Given the legislative history of R.C. 2925.11 and the lack of any unambiguous intent that the State is required to prove the purity of cocaine in a drug possession case, this Court should answer the certified question in the negative and to hold that that the State need only prove that the weight of the cocaine involved is cocaine or a compound, mixture, preparation, or substance containing cocaine.

CONCLUSION

. The Ohio Prosecuting Attorney's Association and the Cuyahoga County Prosecutor's Office urges this Court to reverse the decision of the Sixth District and to hold that in prosecuting possession of cocaine, the threshold weights contained in R.C. 2925.11(C)(4) refer to the weight of the compound, mixture, preparation, or substance that is or contains any amount of cocaine. In doing so, this Court should also answer the certified conflict question in the negative and to hold that the state does not have to exclude the weight of any filler material used in the compound, mixture, preparation, or substance containing cocaine.

Respectfully Submitted,

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SERVICE

A copy of the foregoing amicus brief was filed this 5th day of October, 2015 via the court's electronic filing system and was sent via electronic mail to: Counsel for the State of Ohio, David Harold at dharold@co.wood.oh.us, Counsel for Rafael Gonzalez, Andrew Mayle at amayle@mayleraymayle.com, and amicus counsel Hannah Wilson at Hannah.Wilson@ohioattorneygeneral.gov.

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